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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PEOPLE OF THE TERRITORY OF GUAM,

Respondent,

—against—

JOHN F. FEGURGUR,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Should territorial courts, like state courts, be allowed to interpret constitutional provisions in a territorial Bill of Rights to allow for more expansive liberties and rights than those conferred by analagous constitutional provisions in the Federal Constitution?

Parties to the Proceeding

Respondent is an unicorporated territory. 48 U.S.C. §1421a.

Petitioner is an individual resident of the Territory of Guam.

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PETITION FOR WRIT OF CERTIORARI

Petitioner is not asking this Court to reverse his conviction and set him free. Petitioner is only asking that this Court review a decision of the United States Court of Appeals for the Ninth Circuit and remand the case for rehearing.

OPINIONS BELOW

The opinion of the District Court of Guam Appellate

Division is not reported (A1-A11). The opinion of the Court of Appeals for the Ninth Circuit is reported at 800 F.2d 1470 (9th Cir. 1986) (A12-A18). The order of the Ninth Circuit denying Petitioner's petition for rehearing with suggestion for rehearing en banc is not reported (A19-A20).

JURISDICTION

The Opinion of the Court of Appeals for the Ninth Circuit was rendered on September 29, 1986. Petitioner's Petition For Rehearing With Suggestion For Rehearing En Banc was denied on November 21, 1986. This Court has jurisdiction to review the decision of the Court of Appeals, and its denial of Petitioner's petition for rehearing with suggestion for rehearing en banc, by writ of certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 48 United States Code Section 1421b(e):

> No person shall be deprived of life, liberty, or property without due process of law.

Title 48 United States Code Section 1421b(u):

> The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: Article I, Section 9, Clauses 2

and 3; Article IV, Section 1 and Section 2, Clause 1; the first to the Ninth amendments inclusive; the Thirteenth amendment; the second sentence of Section 1 of the Fourteenth Amendment and the Fifteenth and Nineteenth Amendments.

STATEMENT OF THE CASE

Guam is an unicorporated territory. 48 U.S.C. §1421a. The enabling legislation declaring Guam an unincorporated territory is referred to as the "Organic Act" and it is located at Title 48 United States Code Section 1421 et seq.

The individual rights of the Citizens of Guam are outlined in 48 U.S.C. §142b. This statute contains Guam's Bill of Rights, which is only applicable to the citizens of the Territory of Guam. 48 U.S.C. §1421b(a)-(t). It also contains, and is followed by, a sub-part that makes various segments of the Federal Constitution additionally applicable to Guam. 48 U.S.C. §1421b(u).

There are two distinct due process provisions conferring rights on the citizens of Guam. One is in Guam's Bill of Rights. 48 U.S.C. §1421b(e). The other is the federal due process provisions contained in the Federal Constitution. 48 U.S.C. §1421b(u). Petitioner, being a resident of Guam, has the benefits of both the Due Process Clause in Guam's Bill of Rights and the Due Process Clause in the Federal Constitution.

Petitioner was convicted in the Superior Court of Guam. Petitioner appealed his conviction to the District Court of Guam Appellate Division (hereinafter

"Appellate Division").

In the Appellate Division the Petitioner argued that his conviction should be overturned because of vindictive prosecution. This is a due process argument. The appellate Division upheld Petitioner's conviction, but expressed grave misgivings in so doing (A5).

The only reason the Appellate Division did not reverse Petitioner's conviction was that it felt bound by the doctrine of stare decisis to follow the holdings in Bordenkircher v. Hayes, 98 S.Ct. 663 (1978) and United States v. Gardner, 611 F.2d 770 (9th Cir. 1980) (A5). The Appellate Division's reluctance in adopting the principles in these cases was made evident when the Court stated that it led to an "unduly harsh" result in this particular case, but "stare decisis" required that the Appellate Division reject Petitioner's appeal (A5).

On appeal before the Ninth Circuit, the Petitioner argued that the holdings in Bordenkircher and Gardner merely represented federal interpretations of the rights provided for under the Due Process Clause in the Federal Constitution. Petitioner argued that the Appellate Division was not bound by "stare decisis" to follow the holdings in these cases, because it could interpret the Due Process Clause in Guam's Bill of Rights to provide for greater rights and liberties than those conferred under the Due Process Clause of the Federal Constitution.

The Ninth Circuit panel rejected Petitioner's argument and disposed of this important constitutional matter in a brief footnote. This footnote simply states

as follows:

> Fegurgur suggests that, even if he has no federal remedy, this court should remand with instructions to the District Court that it may provide a Guamanian remedy by an expansive reading of Guam's Bill of Rights. But the Guamanian due process guarantee has been identified with the federal guarantee by statute. 48 U.S.C. §1421b(u) (Supp. 1986). (People v. Fegurgur, 800 F.2d 1470, 1473 n. 3 (9th Cir. 1986) (A18).)

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner submits that this Writ should be granted for three reasons. First, the Ninth Circuit's Opinion is in error as a matter of both fact and law. Second, public policy considerations, which have been recognized by this Court, support the argument of Petitioner. Third, this case presents an important question of constitutional law which has not been, but should be, settled by this Court.

Petitioner concedes that the role of this Court is nof to correct isolated error. However, the error in this case is not merely isolated, it is pervasive. The reasoning of the Court of Appeals requires that no state or territory's seperate guarantee of due process has any effect, when contrasted with the due process clause in the Federal Constitution. Such reasoning is clearly erroneous and should not be allowed to stand uncorrected.

1. THE NINTH CIRCUIT OPINION IS ERRONEOUS AS A MATTER OF FACT AND LAW.

Unfortunately, the reasoning of the Ninth Circuit when addressing the ability of Guam courts to grant more expansive liberties under Guam's Bill of Rights than are available under the Federal Constitution, is not altogether clear. However, It appears that the Ninth Circuit panel was under the mistaken impression that Guam's Due Process Clause in its Bill of Rights and the Due Process Clause in the Federal Constitution are both made applicable to Guam in an identical section of the Organic Act. That section supposedly is Section 1421b(u) of Title 48 United States Code. This is simply not the case.

Guam's Due Process Clause in its Bill of Rights is located seperately in Section 1421b(e) of 48 U.S.C. It is only applicable to the Territory of Guam. It states as follows:

> No person shall be deprived of life, liberty, or property without due process of law.

The Due Process Clause in the Federal Constitution is also seperately made applicable to Guam in Section 1421b(u). This provision simply states that "the second sentence of Section 1 of the Fourteenth Amendment" of the United States Constitution shall be extended to Guam.

The Due Process Clause of the Federal Constitution is made applicable to Guam in an entirely different section of the Organic Act and is seperate and distinct from the Due Process Clause in Guam's Bill of Rights. Compare 48 U.S.C. §1421b(e) to 48 U.S.C. §1421b(u).

Nothing in the Organic Act or in any other statute states or suggests that "the Guamanian due process

guarantee has been identified with the federal guarantee by statute." If Congress had intended for Guam citizens to only have the benefits of the Federal Constitution, then Congress would not have enacted a seperate Guam Bill of Rights. Guam's seperate Bill of Rights either has some effect or it would not have been enacted.

The Ninth Circuit panel is simply in error when it states in an off hand manner that both due process clauses must be interpreted identically because they are applied to Guam in Section 1421b(u). Apparently the Ninth Circuit only considered Section 1421b(u) and did not consider Section 1421b(e). This is an error of both fact and law.

Although it appears that the cause of the Ninth Circuit's error was its merely neglecting to account for the complete text of Guam's Bill of Rights, this is no mere isolated error, nor one that only effects the Petitioner in this case. The mistaken reading effectively nullifies an entire clause of Guam's Bill of Rights without any federal authority to do so. More broadly, public policy considerations show the seriousness of the Ninth Circuit's error and demonstrates that the court would have been wrong had it fully considered the issue and still ruled as it did.

2. PUBLIC POLICY CONSIDERATIONS, WHICH HAVE BEEN RECOGNIZED BY THIS COURT, SUPPORT THE ARGUMENT OF PETIONER.

A territorial court's ability to expand the rights conferred under its own Bill of Rights is a question

of first impression. However, other decisions of this Court pertaining to the territories strongly suggest that territorial courts should be allowed to grant more expansive rights under their own Bill of Rights.

In 1923, the Honorable Oliver Wendell Holmes clearly articulated the public policy reasons for allowing territorial courts a certain degree of latitude when interpreting territorial laws.

> This is especially true in dealing with the desicions of a Court inheriting and brought up in a different system from that which prevails here. When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammer never could have gotten from the books. (Diaz vs. Gonzales, 43 S.Ct. 286, 287-289 (1923).)

The judicial deference recommended in Diaz was reiterated in De Castro vs. Board of Commissioners of San Juan, 24 S.Ct. 1121, 1125 (1944), wherein this Court again expressed the view that local territorial courts should be given certain liberties when interpreting territorial laws.

> But if in the light of such an examination it is found that the rule adopted by the local tribunal is an intelligible one, not shown to

> be out of harmony with local law or practice, it is not to be rejected because we think a better rule could have been devised or because we find it out of harmony with our own traditional system of law and statutory construction. (De Castro, 64 S.Ct. at 1125).

A recent Ninth Circuit decision also suggests that territorial courts should be given certain independence in determining local law, custom or policy.

> In reviewing a decision of a territorial court, we are required to give a high degree of deference to its determination of local law. Specifically, we may not overturn the decision of the District Court of Guam (Appellate Division) on a matter of local law, custom or policy if the decision is based upon a tenable theory and is not inescapably wrong or manifest error. (Schenck v. Government of Guam, 609 F.2d 387, (9th Cir. 1979).

It is a social and geographical fact that territorial courts are much more familiar with territorial needs, customs and concerns. These policy factors suggest that the local territorial courts in Guam, like state courts, should be allowed to interpret the constitutional provisions in Guam's Bill of Rights and provide for more expansive liberties than those conferred by analogous provisions of the Federal Constitution. Guam is similar to a state in that, among other things, it has its own separate Bill of Rights and its own local court system.

3. THE QUESTION PRESENTED IN THIS WRIT

IS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

One of the stated grounds for granting writs is that "an important question on federal law has not been, but should be, settled by this Court." Revised Rules of the Supreme Court of the United States, Rule 17(c). The constitutional issue presented in this case is an issue of first impression and it is an important constitutional issue which should be settled by this Court.

The issue is important because Guam and the Virgin Islands will obviously remain unincorporated territories for a number of years into the future. Hundreds of thousands of people live in these territories and the rights of all of these individuals will be directly affected by the decision in this case.

The issue is also important for relevant political and strategic reasons. As a consequence of recent events in the Philippines and Hong Kong, the strategic importance of the Naval and Air Force bases in Guam cannot be overstressed. Granting review in this case would serve to show a judicial interest in an important strategic jurisdiction. Further, granting Petitioner the relief requested would allow the territorial autonomy that Congress intended, while at the same time preserving the constitutional rights conferred under the Federal Constitution.

CONCLUSION

Petitioner is not asking that territorial courts

be given the unlimited right to solely determine the constitutional rights of territorial residents. The Federal Constitution will remain applicable in the territories and territorial courts will not be allowed to infringe upon the rights conferred under the Federal Constitution.

Petitioner is also not asking this Court to reverse his conviction and set him free. Petitioner is merely asking that a local territorial court be allowed to interpret the rights conferred on Petitioner by the territorial Bill of Rights, without being constrained by some strained interpretation of the doctrine of stare decisis to follow federal interpretations of the Federal Constitution.

Petitioner respectfully requests that his application for a writ of certiorari be granted and that the decision of the Ninth Circuit be reversed. In the alternative, Petitioner requests that a summary order issue from this Court declaring that territorial courts are free to interpret the constitutional provisions in their Bill of Rights to provide for more expansive liberties than those conferred under analogous provisions of the Federal Constitution, with directions that the Ninth Circuit reconsider Petitioner's appeal in accordance with the summary order.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the District Court of Guam Territory of Guam Appellate Division Affirming Defendant's Conviction (Filed on February 25, 1986)

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DISTRICT COURT OF GUAM
TERRITORY OF GUAM

Decided February 25, 1986

DCA NO. 85-00015A/84-0073A

OPINION

PEOPLE OF THE TERRITORY OF GUAM,
Plaintiff-Appellee,

vs.

JOHN F. FEGURGUR,
Defendant-Appellant.

B e f o r e:

LAURETA, DUENAS and WATERS,
District Judges.

LAURETA, *District Judge:*

I

The defendant-Appellant, John F. Fegurgur, was convicted by a jury on January 31, 1985, of distributing heroin on two different occasions in violation of 9 G.C.A. § 67.50; he was subsequently sentenced to twelve years in the Guam Penitentiary. On February 25, 1985, Fegurgur filed a motion to dismiss the criminal action on the ground that 9 G.C.A. § 67.50 as applied to him violated the equal protection and due process clauses of the United States Constitution. The motion was denied and this appeal followed.

Fegurgur now raises the following issues:

1. Whether pursuant to 9 G.C.A. § 67.50 the prosecution violated Fegurgur's constitutional guaranties of due process and equal protection;

2. Whether the criminal action should have been dismissed on the basis of vindictive prosecution;

3. Whether 9 G.C.A. §67.50 violates the Organic Act, 48 U.S.C. §1423a;

4. Whether the Superior Court and had jurisdiction over the criminal action;

5. Whether Guam's Uniform Controlled Substances Act is an "inorganic" delegation of power;

6. Whether improper evidence was admitted which necessitates reversal of the conviction;

7. Whether the case must be remanded to the Superior Court for a determination of the defense of entrapment.

We affirm.

II

A. Due Process and Equal Protection

Fegurgur's acts are punishable both under federal law, 21 U.S.C. §841, (f.n. 1) and under Guam law, 9 G.C.A. maximum prison term of fifteen years and a maximum fine of $25,000.00, (f.n. 3) whereas the Guam statute allows a prison sentence of ten to twenty years and a maximum fine of $50,000.00. (F.N. 4).

Fegurgur initially complains that prosecution and sentencing under the harsher Guam statute violates principles of due process and equal protection. Of course, if Fegurgur was threatened with prosecution under a state law and under a federal law there would be presented no constitutional question; under our federal system a defendant may be subject to prosecution under both state and federal law for the same conduct. United States v. Wheeler, 435 U.S. 313, 320, 98 S.Ct. 1079, 1084, 55 L.Ed.2d 303 (1978). Here, however, Fegurgur argues that the laws of Guam are not statutes created by a sovereign separate from the federal government. Rather, the Territory of Guam is a sub-part of the federal sovereignty; its governmental powers are not inherent but are granted by Congress. See Guam Organic Act,

48 U.S.C. §§1421 et seq. There being only one sovereign, Fegurgur contends, special constitutional considerations arise regarding the application of two independent criminal statutes prohibiting the same conduct but which provide substantively different penalties.

The panel need not set out to precisely define the nature of the Guam-United States relationship for even assuming Fegurgur's characterization to be accurate, the application of the Guam criminal statute presents no questions of constitutional significance.

The United States Supreme Court has addressed a similar argument in United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979). In Batchelder the defendant, a convicted felon, was charged with unlawful possession of a firearm. This act was prohibited under two federal statutes, one providing for a maximum penalty of two years and the other for a maximum penalty of two years and the other for a maximum penalty of five years. The defendant was charged and convicted under the latter statute and sentenced to five years. The Supreme Court, per Justice Marshall, found no constitutional infirmity. Regarding due process, the Court held that so long as the overlapping statutes clearly define the conduct prohibited and the punishment authorized, the notice requirements of due process are satisfied. Moving on to the central issue of the bounds of prosecutorial discretion, the Court stated that the government has broad discretion to proceed under either statute. A defendant has no constitutional right to choose the statute under which he or she will be charged nor the penalty under which he or

she will be sentenced. Rejecting the argument that such discretion is overly broad, in effect "unfettered," and thus unconstitutional merely because of the potential to cause unequal justice, the Court noted that such discretion is limited by constitutional constraints. Specifically, a decision to seek harsher penalties may not be motivated by "improper considerations" or based on "unjustifiable standard(s)." 99 S.Ct. 2205 n.9. That a decision to prosecute is influenced by the penalties available upon conviction does not, standing alone, give rise to a claim for violation of the equal protection or due process clauses. 99 S.Ct. 2205

Accordingly, Fegurgur's argument that it is inherently unfair, and thus unconstitutional, to be charged under the Guam statute must be rejected. Batchelder is dispositive. However, Fegurgur further suggests that the decision to invoke the Guam statute was made in response to the exercise of Fegurgur's Fifth Amendment right to remain silent and was thus based on an "unjustifiable standard." This contention, deserving further discussion, merges with Fegurgur's vindictive prosecution argument and will be considered with it.

B. Vindictive Prosecution

Fegurgur alleges that, upon arrest, he was questioned by an agent of the Drug Enforcement Administration (DEA). During the questioning, the agent allegedly made Fegurgur an offer: if Fegurgur would cooperate in the on-going investigation of heroin distribution on Guam, the federal government would prosecute Fegurgur under the more lenient 21 U.S.C. §841; however, if he refused to cooperate,

he would be prosecuted by the Territory of Guam under 9 G.C.A. §67.50. Fegurgur decided not to cooperate and was prosecuted in Superior Court under the Guam statute. Fegurgur further alleges that of the thirteen defendants charged with involvement in the same "heroin distribution ring," he was the only one prosecuted in Superior Court. Based on these allegations, Guam law was impermissibly based on Fegurgur's decision to exercise his Fifth Amendment right to remain silent.

It is well settled that a defendant's right to due process is violated where the government increases the severity of the charges in response to the exercise by the defendant of statutory or constitutional rights. United States v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982); United States v. Burt, 619 F.2d 831, 836 (9th Cir. 1980). However, the Supreme Court has recognized important exceptions to this general rule, most significantly that of plea bargaining. Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, L.Ed.2d 604 (1978). It is within the very nature of plea bargaining that the prosecution may offer not to seek more severe charges in exchange for the defendant's plea of guilty to a lesser charge. Due process is not violated where the prosecutor carries out a threat made during plea negotiations. 98 S.Ct. 668-669. Rather, it is the unilateral imposition by the government of more severe penalties in response to a defendant's exercise of constitutional rights which raises constitutional concerns. These concerns are not raised however in pre-trial negotiations where the defendant is fully informed of his or her options and where the probable cause to believe that the defendant committed the more serious offense. 98 S.Ct. 668.

The case before this panel differs little from the negotiations discussed in Bordenkircher. Fergurgur was fully informed of his options and the government had probable cause to believe that Fergurgur had committed an act in violation of the Guam statute. The Ninth Circuit has held that it is permissible for the government to file more severe charges where a defendant decides not to cooperate in a criminal investigation. United States v. Gardner, 611 F.2d 770,773 (9th Cir. 1980); United States v. Groves, 571 F.2d 450 (9th Cir. 1978). Fergurgur is unable to distinguish the facts of his case from those of the cases decided by the Ninth Circuit. While the application of this principle to the facts of the instant case appears unduly harsh, we are bound by the decisions of the Ninth Circuit. Stare decisis requires the we reject Ferfurfur's argument.

C. Inconsistency Between 9 G.C.A. §67.50 and 21 U.S.C. §841

The Organic Act, supra, vests in the people of Guam a degree of autonomy over the local matters. Section 1423a of the Act, establishing the legislative branch, provides:

> The legislative power of Guam shall extend to all subjects of legislation of local application not inconsistent with the provisions of . . . the laws of the United States applicable to Guam.

Fergurgur argues that as 9 G.C.A. §67.50 provides harsher penalties than does 21 U.S.C. §841, it is inconsistent and unenforceable.

The operative question is whether local criminal legislation providing for harsher penalties than the statute of a "greater" jurisdiction proscribing the same conduct is inconsistent with the latter statute. For guidance in answering this questions, we may initially look to a city-state analogy. "[T]he relationship of a Territory to a Federal Government has been accurately compared to the relationship between a city and a State." United States v. Wheeler, supra, 98 S.Ct. 1079, 1085 n.16. Among the States there is a split of authority as to whether legislation of a municipality which allows harsher penalties is inconsistent with State legislation. See 5 McQuillan, Municipal Corporations, §17.35 (3rd ed. 1981). The better rule would appearto be that which allows greater flexibility and tolerates different penalty schemes. See, e.g., Ex Parte Volpi, 53 Cal. 229, 199 P.1090, 1093 (1921) ("The fact that the statute or ordinance of the lesser jurisdiction is more exacting, or that the penalty imposed is more or less severe, than that of the greater does not constitute a conflict."); see also Town of Clifton Park v. C.P. Enterprises, 356 N.Y.S. 2d 122, 124 (S.Ct. 1974) (Inconsistent does not mean different; rather, it prohibits local law which would "contradict or would be imcompatible or inharmonious with the general laws of the State").

Of significant assistance is 21 U.S.C. §903 which provides:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would

> otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together. (Emphasis added).

Under §802, "State" is defined to include territories. Pursuant to §903, Guam may prescribe harsher penalties for conduct also prohibited under the federal act. The Guam statute is not inconsistent and does not violate the Organic Act.

D. Superior Court Jurisdiction

Fergurgur argues that as the District Court has jurisdiction in causes "arising under the...laws of the United States," 48 U.S.C. [1424(a), and as the Superior Court explicitly lacks such jurisdiction, Guam Code of Civ.Pro. §82, the Superior Court cannot exercise jurisdiction here because the crime is also prohibited by federal law. This argument is summarily rejected. The Superior Court has original jurisdiction over criminal cases arising under Guam law. 8 G.C.A. §82. Fergurgur was charged and convicted under 9 G.C.A. §67.50. The Superior Court has jurisdiction.

E. Unlawful Delegation of Power

Fergurgur next contends that Guam's Uniform Controlled Substances Act (UCSA), 9 G.C.A. §§67.10 et seq., unconstitutionally delegates to the Governor the power to define offenses and to prescribe penalties regarding controlled substances. Fergurgur argues that since the statute mandates that the Governor revise and republish the schedules each year he was not convicted under a statute properly promulgated

by the legislature but instead, one promulgated by the Governor. Though he concedes similiar laws have passed constitutional muster in other jurisdictions he seeks to distinguish this case on the grounds that, unlike with the other statutes, the Governor is not required to follow any guidelines or procedures under Guam UCSA. This argument must fall.

Sections 67.23-67.31 contains several lists of substances designated with instructions to the Governor on the requisites for inclusion of a particular drug in a particular section. Section 67.32 states:

> "The Governor shall revise and republish the schedules annually and make them available to any registrant law enforcement agency or any member of the public desiring such list."

Following Fegurgur's argument, since the Governor was required to revise and republish these schedules each year since the adoption of the UCSA (formerly the Uniform Controlled Dangerous Substances Act) in 1972 he is being convicted of an offense promulgated by the Governor not the legislature. A similiar statute was scrutinized in United States v. Huerta, 547 F.2d 545 (10th Cir. 1977). In Huerta the appellate was convicted of distributing heroin, a Schedule I controlled substance, in violation of 21 U.S.C. §841(a)(1). He argued on appeal that the statute was without force because the Attorney General failed to republish the schedules as required by that section. The panel rejected this argument reasoning that although the Attorney General had neglected to republish the schedules it would be unreasonable to conclude they were no longer effective. The Court found that

Congress intended "the schedules should remain as initially adopted until changed by the action of the Attorney General." Id. at 547.

Tackling this same issue in United States v. Monroe, 408 F. Supp. 270 (N.D. Cal. 1976), the Northern District of California refused to read §21 U.S.C. §812 as requiring the "Attorney General to formally consider whether to retain or delete from the schedules, substances, which the Attorney General might otherwise not have had occasion to consider." Id. at 274.

Lawmakers have recognized that it is an insurmountable task for a legislative body to keep abreast of the rapid influx of scientific knowledge regarding controlled substances. To alleviate the possibility of loopholes in the codes, statutes have been devised which vest in individuals the authority to update the schedules. Although these statutes often "require" the individuals to revise and republish these schedules each year this has not been literally interpreted to require such revision and republication. Were this the case the individual could negligently or intentionally wipe out the entire controlled substances act by failing to revise and republish it in any given year. United States v. Huerta, 547 F.2d at 547. Additionally, the Guam legislature classified heroin as a controlled substance, the governor has never altered this classification, and Fegurgur cannot now complain that he is being convicted of a crime devised by the governor. See United States v. Porter, 544 F.2d 936 (8th Cir. 1976).

Fegurgur also argues that 9 G.C.A. §67.20 which mandates that the governor shall control all substances

enumerated in §67.23, §67.27, §67.29 and §67.31 and "may make regulations pursuant to the procedures of the Administrative Adjudication Act (Act). . .", is constitutionally infirm because the statute, couched in the word "may" does not require that the Governor follow the Act. This is a matter of statutory interpretation and the Court here differs with Fegurgur. We read §67.20 as giving the Governor the discretion to make regulations. However, we read §67.20 as requiring him to follow the Act in making these regulations when he chooses to do so.

E. Testimony

Turning now to the trial, Fegurgur complains that some of the prosecutor's questions to the defendant and to a defense witness regarding alleged criminal conduct of friends and associates were so prejudicial as to mandate a reversal. Since Fegurgur did not raise these objections at the trial a reversal is necessitated only if "plain error" is found. 8 G.C.A. §130.50(b).

Initially, it is a fundamental principle of American jurisprudence that a defendant's guilt may not be proven by showing that he or she associates with unsavory characters. United States v. Singleterry, 646 F.2d 1014 (5th Cir. 1981). Such evidence may properly be used, however, to refute the defendant's testimony or to impeach. Id. at 1018. Fegurgur objects to two passages in the transcript: 1) the prosecutor's questions to Fegurgur regarding the whereabouts of one Santos (a former roommate accused of distribution of controlled substances) and one Cruz (an associate convicted of narcotics distribution); and 2) the prosecutor's questions to defense witness

Sale regarding the same subjects.

The cross examination of Fegurgur was, with one exception, proper. As to the questioning regarding Santos, Fegurgur "opened the door" on direct by testifying regarding his lack of knowledge of the alleged drug activities or whereabouts or Santos. RT vo. II: 29-30. Therefore, the prosecutor's questions on these subjects, RT II: 32-33, were proper. The questions by the prosecutor regarding Cruz, RT II: 33-34, were posed in an attempt to impeach the credibility of defense witness Sale, a former roommate, who testified that Cruz never visited the house RT II: 15. However, the further question eliciting the response that Cruz is now in the penitentiary for narcotics offenses is more prejudicial than probative and was improper. Likewise, the line of questioning of Sale regarding Santos and Cruz appears to have been intended to introduce testimony of the character of the two friends and is for that reason improper.

However, even though there were some improper questions, these questions do not amount to plain error affecting substantial rights of the defendant in light of the overwhelming record evidence. See United States v. Sutton, 642 F.2d 1001, 1039 (6th Cir. 1980). Reversal is not required.

F. Entrapment

Fegurgur's argument regarding entrapment is meritless. He did not raise this defense at the trial and now combs the record in an attempt to draw together evidence to show entrapment. Since entrapment is an affirmative defense, the defendant has the initial burden of going forward with the

evidence of government involvement and inducement. United States v. Gonzales, 606 F.2d 70, 75 (5th Cir. 1979). The defense of entrapment cannot be raised for the first time on appeal. United States v. Donell, 469 F.2d 85, 86 (th Cir. 1972); United States v. Canabre, 467 F.2d 216 (9th Cir. 1972). No remand is mandated.

III

The conviction is affirmed.

FOOTNOTES

[f.n. 1] 21 U.S.C. §841 provides:

a. Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionall-

[1] to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance[.]

[f.n. 2] 9 G.C.A. §67.50 provides:

a. Except as authorized by this Act, it shall be unlawful for any person knowingly or intentionally -

[1] to manufacture, deliver, or possess with intent to manufacture, deliver, or dispense, a controlled substance[.]

[f.n. 3] 21 U.S.C. §841[b] [1] [A].

[f.n. 4] 9 G.C.A. §80.33[a].

APPENDIX B

Opinion of the United States Court of Appeals For The Ninth Circuit Affirming His Conviction And Reversing His Conviction, Filed September 29, 1986)

FOR PUBLICATION
FILED
SEP. 29, 1986
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Decided September 29, 1986

No. 86-1090

D.C. NO. CR 85-0015 CCD

OPINION

PEOPLE OF THE TERRITORY OF GUAM,
Plaintiff-Appellee,

-vs.-

JOHN F. FEGURGUR,
Defendant-Appellant.

Appeal from the District Court of Guam
Cristobal C. Duenas
District Judge, Presiding
Argued and Submitted Setpember 10, 1986
San Francisco, California

B e f o r e:

CHOY, ALARCON and BEEZER,
Circuit Judges,

BEEZER, *Circuit Judge:*

John F. Fegurgur appeals from the decision of the District Court of Guam, Appellate Division, affirming his conviction on charges of heroin distribution. He seeks reversal of his conviction on three grounds: (1) the government's vindictive prosecution violated his due process rights; (2) improper evidence was admitted at trial, (3) Guam's Uniform Controlled Substances Act is unconstitutional and in conflict with Guam's Organic Act. We affirm.

Appellant Fegurgur was indicted in October 1984 for delivery of heroin in violation of Guam's Uniform Controlled Substances Act, 9 G.C.A. §67.10 et Seq. ("UCSA"). Upon arrest, but before counsel had been appointed for him, an agent of the Drug Enforcement Administration ("DEA") offered him the following choice: "cooperate" with the DEA and be charged in federal District Court under 21 U.S.C. §841, or refuse and be charged in Guam Superior Court under the UCSA. Since penalties under the federal statute are more lenient than those under the UCSA, there was an advantage to cooperation. (F.N. 1). Though neither side has explained what was meant by "cooperation," it is evident that Fegurgur was encouraged to plead guilty and supply information leading to convictions of others on drug-related charges.

Fegurgur, asserting his innocence, refused to

make a statement. He was accordingly furnished with counsel, tried in the Superior Court, convicted, and sentenced to two concurrent terms of fifteen years each. (f.n. 2). His appeal to the District Court, Appellate Division, was unsuccessful. Three of the seven issues raised in that appeal are now before us.

Fegurgur first claims that he was prosecuted in the Superior Court of Guam rather than the District Court of Guam solely because he exercised his Fifth Amendment right not to incriminate himself. Out of approximately thirteen people arrested on the same charge, only Fegurgur was tried in Superior Court. He argues that this was vindictive prosecution, a deprivation of due process rights, and that his conviction should be set aside.

The standard of review in a vindictive prosecution case is unsettled in this circuit. United States v. Gann, 732 F.2d 714, 724 (9th Cir.), cert. denied, 105 S.Ct. 505 (1984) (citing cases applying the "abuse of discretion" and "clearly erroneous" standards). The de novo standard was suggested in Unite States v. Martinez, 785 F.2d 663, 666 (9th Cir. 1986). On any of these standards, we would affirm.

It is an unconstitutional deprivation of due process for the government to penalize a person merely because he has exercised a protected statutory or constitutional right. United States v. Goodwin, 457 U.S. 368, 372 (1982). For example, the Supreme Court has held that a sentence imposed after a successful appeal and reconviction may be struck down where its severity appears vindictive. North Carolina v. Pearce, 395 U.S. 711, 723-26 (1969). The Court has recognized,

however, that pretrial plea negotiations between the government and a criminal defendant are a special case. After all, plea negotiations are essentially a matter of the government threatening additional charges or other penalties to induce a defendant to forego his right to stand trial. "If such use of 'additional' charges were presumptively invalid, the institution of plea negotiations could not survive." United States v. Goodwin, 457 U.S. at 379, n.10. Accordingly, the Court has said that it will not find pretrial plea negotiations unconstitutional unless it is shown that the prosecutor's threats were "not permissible" or "could not be justified as a proper exercise of prosecutorial discretion." Id. at 380, n.12.

Fegurgur argues that, since he was not represented by counsel during plea negotiations, this court should scrutinize those negotiations more closely. This argument fails for three reasons: (1) there is no evidence that the defendant in Goodwin was represented by counsel during negotiations; (2) the presence of counsel is chiefly relevant to the issue of whether a guilty plea made during negotiations is voluntary, e.g. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (Fegurgur made no gulity plea); and (3) Fegurgur does not allege that he was injured by the absence of counsel.

Prosecutorial discretion to charge is very broad. United States v. Goodwin, 457 U.S. at 382. The cases suggest only two limitations. A prosecutor may not selectively enforce the law based on the race or religion of the defendant. United States v. Batchelder, 442 U.S. 114, 125 n.9 (1979). Nor may a prosecutor bargain with threats of charges which he has no probable

cause to believe are warranted. Bordenkircher v. Hayes, 434 U.S. at 364; United States v. Gardner, 611 F.2d 770, 773 (9th Cir. 1980). Fegurgur does not claim that he was picked out for prosecution under the Guam statute because of his race or religion, nor doe he deny that he was plainly subject to prosecution under that statute. It follows that his claim of vindictive prosecution must fail. (f.n. 3).

Fegurgur next claims that the government subjected him to improper cross examination. During Fegurgur's testimony, the prosecutor elicited and admission that Bob Cruz, a convicted heroin dealer, was a frequent visitor to Fegurgur's home. No objection was made at trial. The District Court concluded that the examination was improper in part but not reversible error because of "overwhelming" evidence of guilt.

Absent timely objection, prosecutorial misconduct is cause for reversal only if it rises to "plain error." United States v. Young, 105 S.Ct. 1038, 1046 (1985):

> [Fed. R. Crim. P. 52 (b)] authorizes the Court of Apeals to correct only 'particularly egregious errors,' those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.' In other words, the plain error exemption to the contemporaneous objection rule is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.

Id. at 1046-47 (citations omitted).

With this deferential standard in mind, we cannot stay that the prosecutor's remarks constituted plain

error. The improper questioning was brief and Fegurgur does not claim that it was referred to in summation. The government appears to have relied chiefly on tape recordings of actual drug sales by Fegurgur to an informant, not on evidence of Fegurgur's associations. Fegurgur has not shown that the improper remarks produced a miscarriage of justice.

Lastly, Fegurgur claims that the Uniform controlled Substances Act is unconstitutional or in conflict with Guam's Organic Act.

Fegurgur was convicted under Guam's Uniform controlled Substances Act ("UCSA"), 9 G.C.A. §67.10 et seq. (1982). The UCSA sets forth regulations and penalties applicable to persons possessing certain scheduled drugs. The UCSA further provides that:

> The Governor shall control all substances enumerated [in the UCSA schedules] and may make regulations pursuant to the procedures of the Administrative Adjudication Act to add, delete, or reschedule a substance as a controlled substance. In making such a determination, the Governor shall consider the following: [eight considerations are listed].

9 G.C.A. §67.20. Moreover, "[t]he Governor shall revise and republish the Schedules annually . . . 9 G.C.A. §67.32.

Fegurgur argues that this statute, by giving the Governor discretion to define "controlled substances," violates separation of powers principles of the Federal Constitution. The District Court disagreed. The District Court's interpretation of statute is reviewed de novo.

Cf. Matter of McLinn, 739 F.2d 1395, 1398 (9th Cir. 1984) (en banc).

The Governor does not have excessive discretion to define controlled substances. As the District Court correctly held, the UCSA permits the Governor to amend the statutory schedules, but it requires the procedures of Guam's Administrative Adjudication Act to be followed whenever such an amendment is made. Accordingly, there is no unconstitutional delegation of power from the Guam Legislature to the Governor. Cf. United States v. Gordon, 580 F.2d 827 (5th Cir.), cert. denied, 439 U.S. 1051 (1978) (federal UCSA involves no improper delegation). (f.n. 4).

Guam's Organic Act, 48 U.S.C. §1421 et seq., vests the "legislative power and authority of Guam" in the Guam Legislature. 48 U.S.C. §1423(a) (Supp. 1986). Fegurgur argues that, since the Organic Act does not expressly provide for delegation of legislative power, even limited delegation is illegal. The District Court did not expressly ruleon this claim. It held instead that there was no delegation in this case at all, since heroin was originally defined as a controlled substance by the Legislature, not by the Governor.

Fegurgur's argument, unsupported by authority, is unpersuasive. The power to delegate is naturally included in a grant of legislative power. Congress, for example, has power to delegate rule-making authority. Yakus v. United States, 321 U.S. 414, 424 (1944); Plum Creek Lumber Co. v. Hutton, 608 F.2d 1283, 1288 (9th Cir. 1979). This is true even where violation of the rules is treated as a criminal offense.

United States v. Grimaud, 220 U.S. 506, 521 (1911). "A constitutional power implies a power of delegation of authority under it sufficient to effect its purposes." Lichter v. United States, 334 U.S. 742, 778 (1948).

In granting "legislative power" to the Guam Legislature, Congress granted a power analogous to its own. Even if the UCSA delegates to the Governor power to apply the legislative policy to particular circumstances, such delegation is permissible under the Organic Act.

AFFIRMED.

FOOTNOTES

[f.n. 1] Guam 's Attorney General admits this much of Fegurgur's story. Fegurgur alleges, in addition, that a DEA agent attempted to induce cooperation by contrasting the leniency of the District Court judge with the [relative] severity of the Superior Court judge. These remarks, although unseemly, do not affect the legal outcome of this case.

[f.n. 2] The maximum sentence available under the federal statute is fifteen years. 21 U.S.C. §841[b].

[f.n. 3] Fegurgur suggests that, even if he has no federal remedy, this court should remand with instruction to the District Court that it may provide a Guamanian remedy by an expansive reading of Guam's Bill of Rights. But the Guamanian due process guarantee has been identified with the federal guarantee by statute. 48 U.S.C. §1421b[u] [Supp. 1986].

[f.n. 4] Even if the Governor's discretion were unconstrained and there were an imbalance of Guamanian power, it is hard to see how the Federal Constitution would be implicated.

APPENDIX C

Order of the United States Court of Appeals For The Ninth Circuit Denying Defendant's Petitioner For Rehearing And Rejecting Defendant's Suggestion For Rehearing En Banc (Filed November 21, 1986)

FILED
NOV. 21, 1986
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-1090

D.C. NO. CR 85-0015 CCD

ORDER

PEOPLE OF THE TERRITORY OF GUAM,
Plaintiff-Appellee,

-vs.-

JOHN F. FEGURGUR,
Defendant-Appellant.

Appeal from the District Court of Guam

B e f o r e:

CHOY, ALARCON and BEEZER,
Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.